No. 11,786.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

KANAME FUJINO, *Appellant,*

v.

TOM C. CLARK, Attorney General of the United States, *Appellee.*

On Appeal from the District Court of the United States for the Territory of Hawaii.

MEMORANDUM ON BEHALF OF KANAME FUJINO, APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MEMORANDUM ON BEHALF OF KANAME FUJINO, APPELLANT.

The District Court committed a basic error of law which corrupts the whole judgment in this case. The Court held that the recorded power of attorney (Exhibit E, R. 479) executed by appellant's father was insufficient to authorize his attorneys in fact to do his bidding and make a gift of the land to his son.[1] We have pointed out this error in our

[1] A similar power of attorney (Exhibit F, R. 483) was executed by appellant's mother and likewise recorded in the Land Court on the same day, March 17, 1941. (R. 483)

brief, pp. 11-23. It is clear that the lower court erred both as a matter of local law and general law. Does this error require a reversal of the judgment? We say that it does.

I.

THE POWER OF ATTORNEY AND DEED IN QUESTION WERE REGISTERED IN THE LAND COURT.

At oral argument there were questions from the bench as to the effect of the registration of the power of attorney and the deed of gift under the land court system. In Hawaii we have the Torrens' Title System. Under that system, land is registered in the Land Court of the Territory of Hawaii and all deeds, mortgages, powers of attorney, encumbrances, claims and trusts (express and implied) of every character must be noted on the certificate of title. Once a certificate of title is obtained, the certificate itself is conclusive against all the world of the ownership and of the facts therein stated. Any claimant who may be adversely affected in either original registration or subsequent transfer through error, fraud, mistake or negligence, must proceed in the Land Court to establish his claim.

[2] The power of attorney (Exhibit E, R. 479) was registered in the Land Court on March 17, 1941 and in obedience to the statute was "noted" on the father's certificate of title (R. 479). The deed (Exhibit H, R. 501) from the father to appellant was also registered in the Land Court, and on the basis of that instrument, Certificate of Title No. 2407 issued to appellant on May 19, 1941 (R. 153-155).

II.

THE EFFECT OF THE LAND COURT STATUTE.

The land court statute is contained in chapter 307, Revised Laws, Hawaii, 1945.

Section 12647, R. L. H. 1945, provides:

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[2] In Re Rosenbled, 24 Haw. 208, 307; Re School Lane Land Title, 32 Haw. 680.

> The original certificate in the Registrar's book * * * and also the owner's duplicate certificate shall be received as evidence in all courts of the Territory and shall be conclusive as to all matters contained therein, except as otherwise provided in this chapter.

This means that the certificate of title is the complete evidence of ownership.

Section 12649 provides:

> The act of registration shall be the operative act to convey or affect the land.

When the Registrar of the Land Court registered the deed and issued a certificate of title to appellant, title to the land passed.

Section 12651 provides:

> All interests in registered land less than an estate in fee simple shall be registered by filing with the Assistant Registrar the instrument creating or transferring or claiming such interest and by a brief memorandum thereof made upon the certificate of title and signed by him.

Section 12664 requires trusts to be noted on the certificate, and Section 12667 requires claimants under an implied or constructive trust to file a statement with the Registrar for registration.

The purpose of Sections 12651, 12664 and 12667 is to oblige persons to disclose trusts (express and implied) affecting registered land, and to afford the statutory framework for the claimant of an interest in registered land to have his claim determined by the court and noted on the certificate.

It will be observed that the Torrens Title System is not the ordinary recording act routine whereby a person dealing with real property simply files his instrument in the record office. Under the Land Court system, it is not only a careful administrative system, but also involves judicial action. Section 12652 requires the Assistant Registrar of

the Land Court in case of doubt upon any question under the system to refer the matter to the judge of the Land Court for decision. Section 12652 requires judicial action in all cases of doubt:

Doubtful Questions

> Where the assistant registrar is in doubt upon any question * * * the question shall be referred to the court for decision.

Section 12692 requires that any person dealing with land court property by power of attorney must file his power of attorney with the Assistant Registrar. The power of attorney in question was filed with the Assistant Registrar of the Land Court who accepted it in performance of his statutory duty together with the deed conveying the land from the father to appellant as an effective transfer of the title and accordingly issued to appellant a certificate of title evidencing complete ownership in him.

III.

GOVERNMENT'S DEFENSES INCLUDE THE ALLEGED INVALIDITY OF THE POWER OF ATTORNEY.

The answer filed on behalf of the Government interposed three defenses, first that the power of attorney was invalid and that "by reason of said lack of authority * * * the real and beneficial ownership of said real property continued to be in Yotaro Fujino" (R. 29).

As a separate and second defense, the Government alleged that the conveyance was effected by appellant, his father, and the attorneys in fact "in a conspiracy and with the purpose and intent to defraud and to continue to defraud the United States" (R. 30).

The third separate defense was that since March 21, 1941, and the Vesting Order No. 2724, December 3, 1943, (R. 17) appellant "acted directly and indirectly for the benefit or on behalf of Yotaro Fujino * * * and plain-

tiff is therefore a national of a foreign country * * * and as such has no standing to institute or command this action" (R. 31).

All of the evidence adduced in this case was produced by appellant. There was no evidence of any sham, fraud or conspiracy, and the District Court made no finding that the transaction was a sham or fraud which would authorize a seizure and confiscation under Section 7 (c) of the Act. Had there been any fraud or had the transaction been a sham, then the beneficial ownership would have remained in the alien father and could be vested under Section 7 (c) of the Act.

The District Court did find:

> In holding the record title to the land plaintiff has acted for and on behalf of his father and has been controlled by him (R. 55).

It is our contention that the error of law made by the trial court as to the legal effect as to the recorded power of attorney led the court into the error of concluding that the beneficial ownership remained in the father. This is clear in the court's decision under "Comment." Immediately after stating the findings of fact, the court gives the key to its entire decision by saying:

> *In the first place the plaintiff has no title to the real property.* True his father, as a part of his plant, admittedly intended to make a gift of it to him, but the means employed rendered the execution of his plan ineffective (Emphasis supplied, R. 55).

Of course, if the "means employed," i.e., the power of attorney was "ineffective," then as a matter of law no title passed from the father to the son. It is clear that this is what Judge MacLaughlin meant when he said in finding that "the beneficial ownership of the land" remained in the father (R. 55). The same error of law crept into his conclusion of law D. 1, when the court held that the real property in question was:

Property "owing or belonging to or held for, by, on account of or on behalf of or for the benefit of, an enemy" (R. 59).

IV.

ERRORS OF LAW BY THE DISTRICT COURT UNDER SECTION 5 (b).

The court then assumes that the power of attorney was effective but denies recovery under Section 5 (b) of the Act. From this point on the decision of the court rests on two conclusions of law, and we contend the court erred in both. First that the acts done prior to war showing filial ties (appellant's gifts to his sisters and the wedding gift to the brother of an employee) and the payment of his father's federal income tax, after hostilities) do not constitute "control" which Congress had in mind in authorizing the seizure and confiscation of property of an American citizen. The second error of law by the District Court is in the construction of Section 5 (b) in which he placed the burden of proof upon appellant to prove that he was not controlled by his father. The court said:

> The plaintiff has failed to meet the burden of proving (1) that he has an "interest, right or title" to the real property (here the court has in mind the lack of authority under the power of attorney) * * * and that if he has, (2) he holds the same "for his own * * * and sole use and benefit" (Section 5 (b) of the Act). (R. 55)

What the court is here saying is that an American citizen who holds title to land situated in the United States, who by his accident of birth happens to have an alien father who deeded the property to him prior to the outbreak of war is obliged to prove not only his citizenship but also the fact that he is not controlled by an alien in order to avoid confiscation of his property.

To reach this result the Government asserts that the President of the United States acting through a desig-

nated agency may by executive order find that an American citizen is a national of an enemy country and may confiscate his property under Section 5 (b) of the Act, and that when the American citizen brings his action for recovery which Congress has provided, he is obliged to prove not only his American citizenship but satisfy the court by assuming the burden of proof that he is not under the control of an alien. This construction of the Act is necessary to affirm the judgment below. We say that if this is the proper construction of the Trading With the Enemy Act it is unconstitutional. This startling construction is urged by the Government in face of the statutory definition of the word enemy as contained in Section 2:

> The word "enemy" as used herein, shall be deemed to mean, * * * such * * * individuals as may be natives, citizens or subjects of any nation with which the United States is at war, *other than citizens of the United States* * * * (Emphasis supplied).

We suggest that this court should be slow to adopt such a construction of the Act which will result in clothing the Alien Property Custodian with the power to designate an American citizen as an enemy and then empower him to confiscate a citizen's property.

The evidence in this case is largely documentary, plus a deposition, and undisputed oral testimony. There is no conflict in the evidence. The case does not depend upon the weight of the evidence or the credibility of witnesses. In these circumstances it is well settled that under Rule 52 (a) (as under the old equity practice) this court not only has the right but is charged with the burden of reviewing the findings of fact as well as the conclusions of law of the trial court.

> *Equitable Life* v. *Irelan*, 123 F. 2d. 462, 464 (9 CCA 1941).
> *Fleming* v. *Palmer*, 123 F. 2d. 749, 751 (1 CCA 1941).
> *Stone* v. *Stone*, 136 F. 2d. 761, 764 (CCA D. C. 1943).
> *Himmel* v. *Serrick*, 122 F. 2d. 740, 742 (7 CCA 1941).

United States v. *Mitchell,* 104 F. 2d. 343, 346 (8 CCA 1939).
In re Chicago & N. W. R. Co., 110 F. 2d. 425, 427 (7 CCA 1940).
Becker v. *Miller,* 1 F. 2d. 293, 295 (2 CCA 1925).
Chesapeake & Ohio RR. v. *Martin,* 283 U. S. 209, 216 (1931).

The effect of the rule and the powers and duty of the reviewing court has recently been authoritatively settled.

United States v. *United States Gypsum Co.,* 68 S. Ct. 525, 542 (1948 Adv.).

> The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This case is an appropriate one for applying the rule laid down by the Supreme Court. This is particularly so in view of the error of law made by the trial court on the sufficiency of the power. It is impossible to say that the trial judge did not make his "finding a fact" that the father retained "ownership of the land" (R. 55) under the erroneous supposition that the power was invalid for purposes of making a gift. The mere fact that a part of judge's decision is labeled "Findings of Fact" does not put the matter beyond the reach of an appellate court. If the rule were otherwise errors of law implicit in the "findings of fact" (as here) would stand uncorrected.

We submit that the judgment below should be reversed and the cause remanded with directions to enter judgment for appellant. If the court has any doubt as to the propriety of such a direction then the cause should be re-

manded with directions to the trial court to make findings of fact freed from the errors of law committed in this case.

Dated, Washington, D. C., September 22, 1948.

Respectfully submitted,

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